STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HEATHER ANNE BEARSS,

Defendant-Appellant.

UNPUBLISHED
July 16, 1999

No. 209568
Emmet Circuit Court
LC No. 97-116608 FH

Before: Neff, P.J., and Hood and Murphy, JJ.

PER CURIAM.

Defendant was convicted by a jury of one count of false pretenses over $100, MCL 750.218; MSA 28.415. She was sentenced to twelve months in jail and twenty-four months of probation. She appeals as of right, and we reverse and remand.

Defendant argues that there was insufficient evidence presented at trial to convict her of false pretenses. In reviewing the sufficiency of the evidence, we view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could conclude that the essential elements of the crime were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). We agree with defendant that there was insufficient evidence to support her conviction for false pretenses.

The elements of the crime of false pretenses are as follows:

> (1) a false representation concerning an existing fact, (2) knowledge by the defendant of the falsity of the representation, (3) use of the representation with intent to deceive, and (4) detrimental reliance on the false representation by the victim. [*People v Reigle*, 223 Mich App 34, 37-38; 566 NW2d 21 (1997) (citations omitted).]

The pretense relied upon to establish the offense must be a misrepresentation concerning a present or existing fact or a past fact or event. *Id.*; *People v Vargo*, 139 Mich App 573, 577; 362 NW2d 840 (1984).

In *People v LaRose*, 87 Mich App 298; 274 NW2d 45 (1978), this Court addressed the crime of false pretenses in a situation where the defendant presented an insufficient funds check to the National Bank of Jackson in the amount of $150. The check was drawn on the Onsted Bank. The defendant testified that at the time he presented the check to the National Bank of Jackson, he knew that the Onsted account did not have sufficient funds to cover it. He admitted that he intended to defraud the National Bank of Jackson. *Id.* at 301. In reversing his conviction, this Court stated:

> [I]n the instant case the only 'false pretense" shown is the presentation of an insufficient funds check. *People v Vida*, 2 Mich App 409; 140 NW2d 559 (1966), aff'd 381 Mich. 595 [ ] (1969), and *People v Niver*, 7 Mich App 652; 152 NW2d 714 (1967), are readily distinguishable due to the *proof of false representation, in addition to presentation of an insufficient funds check*, by the defendants in those cases. The instant defendant's only false pretense was his "false representation, either express or implied, incident to the giving of a check, that the maker then has funds on deposit from which the bank will pay the check on presentation". *People v Jacobson*, 248 Mich 639, 642; 227 NW 781, 782 (1929). [*LaRose, supra* at 303 (emphasis added).]

The *LaRose* Court further noted:

> Although presentation of an insufficient funds check may, if accompanied by additional false representation, justify conviction under the false pretenses statute . . ., we hold that the instant facts preclude prosecution under that statute. It was clearly the Legislature's intent, in enacting the insufficient funds statute, to carve out an exception to the false pretenses statute and to provide for a lesser penalty for the particular type of false pretense involved in presentation of an insufficient funds check. [*Id.*, (citations omitted).]

In *People v Chappelle*, 114 Mich App 364; 319 NW2d 584 (1982), the defendant was charged with false pretenses. A panel of this Court cited to *LaRose*, *supra* for the proposition that the presentation of an insufficient funds check without additional false representations cannot support a charge for false pretenses. *Id.* At 367-368. In *Chappelle*, the defendant not only presented an insufficient funds check, but also presented a false address and a false drivers license, and set up a bogus company with the intent to defraud. This Court found that she was properly charged with false pretenses. Nevertheless, one of her several convictions was reduced from a false pretense conviction to a conviction for insufficient funds. It was reduced because "[r]eliance is an essential element of the offense of larceny by false pretenses" and the evidence was "absolutely clear that the store clerk who took the defendant's check did not rely on anything that the defendant said or did in the accomplishment of the defendant's fraud." *Id.* at 370.

Here, the checks that Tiffany Ruppert presented to the cashier at Glen's Market were apparently her own, with her correct name, address, and account number printed on them. Thus, the checks provided no false representations. Although Ruppert intended to later report the checks as stolen and to stop payment on them, this alleged "pretense" is no different than the presentation of an

insufficient funds check. When Ruppert handed the checks over to the cashier at Glen's, there was no false representation made except for the "false representation, either express or implied . . . that the maker then [had] funds on deposit from which the bank will pay the check on presentation." *LaRose, supra* at 303. The only "pretense" was the implied promise that there was sufficient money in Ruppert's checking account to cover the checks and that they would be paid. We note that Ruppert testified that she did not have money in her account to cover the checks when she wrote them. This situation is analogous to *LaRose, supra*.

In making our ruling, we acknowledge that there was testimony that Ruppert and defendant falsely informed the cashier at Glen's that Ruppert was purchasing a large number of items because she just moved from California. This testimony does not alter our conclusion. Even if this alleged statement was a false representation, which could support the charge of false pretenses, there was no evidence at all that the cashier detrimentally relied on that statement. To support a conviction for false pretenses, the victim had to detrimentally rely on the false representation. *Reigle, supra* at 37-38; *Chappelle, supra*. Here, the cashier testified that she never heard defendant or Ruppert make any statements regarding California.

Our ruling is also not altered by the fact that Ruppert claimed to have disguised her handwriting on the checks she gave to the cashier. Ruppert signed her own name on her own check. She did not represent to the cashier that she was anyone other than herself. Accordingly, we conclude that the disguised handwriting was not a false representation. Moreover, we note that the person Ruppert intended to mislead with the disguised handwriting was not the clerk, but the person to whom she was going to report that the checks were stolen.

Viewing the evidence in the light most favorable to the prosecutor, we conclude that a rational trier of fact could not have found that the essential elements of the crime of false pretenses were proved beyond a reasonable doubt. *Wolfe, supra*. The evidence, however, was more than sufficient to sustain a conviction for the alternative lesser charge of three insufficient fund checks within ten days. There was evidence that defendant and Ruppert intended to defraud, that three checks were drawn on the same day, and that defendant and Ruppert knew that Ruppert did not have sufficient money in her account to cover those checks. This case is markedly similar to *Chappelle, supra*, in which this court remanded for entry of a judgment on the lesser included charge. Here, the jury was specifically instructed on the lesser included offense of three insufficient fund checks within ten days. Therefore, we remand for entry of judgment and sentence on that lesser charge.

Defendant also raises four additional issues on appeal, none of which is meritorious.

First, defendant argues that the trial court should not have allowed Ruppert to testify about her plea agreement. Evidence of an accomplice's plea agreement may be properly admitted by the prosecution. *People v Standifer,* 425 Mich 543; 390 NW2d 632; *People v Dowdy*, 211 Mich App 562; 536 NW2d 794 (1995). Moreover, the credibility of a witness is always a fact that is of consequence to the determination of the action. *People v McKinney,* 410 Mich 413, 420; 301 NW2d 824 (1981). In this case, Ruppert was the main prosecution witness and her credibility was clearly an issue. Thus, the evidence was relevant. And, any danger of unfair prejudice was eliminated when the

court immediately gave a limiting instruction to the jury following the testimony about the plea arrangement. Therefore, we do not find that it was error to admit the testimony. Further, even if it were error to have admitted the testimony, the error was harmless.

Second, defendant argues that the trial court improperly denied her motion to dismiss, which was based on her claim that a six and one-half month delay in arrest resulted in severe prejudice. The threshold test for determining whether a delay between an offense and an arrest constitutes a denial of defendant's due process is whether the defendant was prejudiced. *People v Reddish*, 181 Mich App 625, 627; 450 NW2d 16 (1989). The defendant bears the burden of coming forward with evidence of actual and substantial prejudice to her right to a fair trial. *People v Adams*, 232 Mich App 128, 133-134; 591 NW2d 44 (1998), lv pending. In this case defendant has failed to do so. Her general allegations of memory loss do not support a finding of actual and substantial prejudice. *People v Loyer*, 169 Mich App 105, 119-120; 425 NW2d 714 (1988). Moreover, the fact that a potential witness, Nathan Reese, died is also insufficient, in itself, to establish actual and substantial prejudice. *Adams, supra* at 136. Death of a potential witness could demonstrate the requisite prejudice if exculpatory evidence is lost. *Id.* Here, however, we do not find that exculpatory evidence was lost. Reese's prior statement to the police did not offer any exculpatory evidence for the defendant, so there was no reason to believe that any testimony he would have given at trial would exculpate defendant. In addition, defendant's speculation that Reese's testimony may have been helpful does not provide sufficient basis to find actual and substantial prejudice.

Third, defendant argues that she was denied her constitutional right to a speedy trial because she was not brought to trial until approximately eleven months after her arrest. When a delay is under eighteen months, a defendant must prove prejudice in order to prevail on a claim that she has been denied a speedy trial. *People v Daniel*, 207 Mich App 47, 51; 523 NW2d 830 (1994). General allegations of prejudice caused by the delay, such as the unspecified loss of evidence or memory, are sufficient to establish that a defendant was denied her right to a speedy trial. *People v Gilmore*, 222 Mich App 442, 462; 564 NW2d 158 (1997). Here, defendant's claims of prejudice are unpersuasive for the same reasons as stated above with regard to the delay in her arrest. Defendant's claims of memory loss were not specific, and although Reese died, it is not clear that Reese would have provided any exculpatory evidence.

Finally, defendant argues that the trial court improperly admitted evidence of prior bad acts pursuant to MRE 404(b). We disagree. The evidence was properly admitted. See *People v VanderVliet*, 444 Mich 52 , 74-75; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994). The evidence was offered for a proper purpose under MRE 404(b) where it tended to demonstrate intent, scheme, plan, knowledge, and absence of mistake. The evidence was also relevant, material and probative to issues of consequence at trial, specifically whether defendant aided and abetted Ruppert and whether defendant was aware of and had participated in the check writing

Reversed and remanded for entry of judgment and sentence on the lesser insufficient funds charge, MCL 750.131a(2); MSA 28.326(1)(2). We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Harold Hood